Office - Supreme Court, U.S.
FILED
JUL 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2147

# In The
# SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE STATE OF ARIZONA, ET AL.,
*Petitioners,*

v.

SAN CARLOS APACHE TRIBE OF ARIZONA
AND THE NAVAJO TRIBE OF INDIANS, ET AL.,
*Respondents.*

## BRIEF OF *AMICI* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID H. LEROY
Attorney General of Idaho
Room 210, Statehouse
Boise, Idaho 83720
Telephone: (208) 334-4448
*Attorney for the State of Idaho*

ROBERT O. WEFALD
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
Telephone: (701) 224-2210
*Attorney for the State of North Dakota*

RICHARD H. BRYAN
Attorney General of Nevada
Herold Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
*Attorney for the State of Nevada*

JEFF BINGAMAN
Attorney General of New Mexico
RICHARD A. SIMMS
Special Assistant Attorney General
(Counsel of Record)
Bataan Memorial Building
Santa Fe, New Mexico 87503
Telephone: (505) 827-2325
*Attorney for the State of New Mexico*

DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261
*Attorney for the State of Utah*

WILSON L. CONDON
Attorney General of Alaska
Pouch K
Juneau, Alaska 99811
Telephone: (907) 465-3600
*Attorney for the State of Alaska*

## QUESTION PRESENTED

Although the decision of the United States Court of Appeals for the Ninth Circuit addressed other questions, this brief of *amici* is confined to the following issue:

> Do provisions in the State of Arizona's Constitution and Enabling Act which disclaim jurisdiction over Indian lands prohibit Arizona state courts from exercising jurisdiction to adjudicate water rights claimed by the United States on behalf of Indian tribes?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented | i |
| Table of Authorities | iii |
| Interest of Amici | 1 |
| Reason for Granting the Writ: the Decision Below Conflicts With the Decisions of this Court Interpreting the McCarran Amendment and Is Expressly Contrary to a Decision of the Tenth Circuit Court of Appeals | 5 |
| I. Colorado River Water Conservation District v. United States | 5 |
| II. Jicarilla Apache Tribe v. United States | 7 |
| Conclusion | 9 |

## TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| *California v. United States* 438 U.S. 645 (1978) ..... | 2 |
| *Colorado River Water Conservation District v. United States* 424 U.S. 800 (1976) ..... | 1,2,5,7,8 |
| *Dugan v. Rank* 372 U.S. 609 (1963) ..... | 1 |
| *Jicarilla Apache Tribe v. United States* 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979) ..... | 4,6,7,8 |
| *Miller v. Jenkins* 243 F.2d 157 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957) ..... | 2 |
| *Organized Village of Kake v. Egan* 369 U.S. 60 (1962) ..... | 6 |
| *White Mountain Apache Tribe v. Arizona* 649 F.2d 1274 (9th Cir. 1981) ..... | 6 |
| *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832) .... | 6 |
| STATUTES | |
| Act of August 15, 1953, 67 Stat. 589 partially codified at 25 U.S.C. § 1322 28 U.S.C. § 1360 ("P.L. 83-280") ..... | 8 |
| 43 U.S.C. § 666 ("McCarran Amendment") ..... | 2,4,5,6,7,8 |
| OTHER | |
| Senate Report No. 755, 82d Cong., 1st Sess. (1951) | 2 |

No. 81-2147

# In The
# SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE STATE OF ARIZONA, ET AL.,
*Petitioners,*

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, ET AL.,
*Respondents.*

## BRIEF OF *AMICI* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## INTEREST OF AMICI

The Western States named herein as *amici curiae* have each established elaborate systems of water management and allocation similar to Arizona's in a region where water is the lifeblood.[1] As this Court has repeatedly recognized, Congress has traditionally deferred to these state systems to allocate water within their boundaries. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

In order to insure the proper administration of western state water laws, it is essential to be able to join all water-using parties in a single forum to establish relative water rights. Indeed, failure to join known interested parties is a jurisdictional defect which may invalidate any attempt to adjudicate relative water rights. *Dugan v. Rank*, 372 U.S.

[1] Utah Code Ann., §§ 73-4-1 to 73-4-24 (1953); North Dakota Code § 61-03 *et seq.* (1981); New Mexico Stat. Ann., § 72-4-1 to 72-4-20 (1978); Idaho Code, §§ 42-1401-1415 (1981); Nev. Rev. Stat., § 533.010 *et seq.* (1981); and A.S. 46.15.050 (1966).

609 (1963); *Miller v. Jenkins*, 243 F.2d 157, 159 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957). Without participation from all claimants it is virtually impossible to settle conflicting interests to the use of water in a given water course, thus defeating the purpose of comprehensive general adjudications of water rights.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), this Court held that Colorado state courts could properly adjudicate Indian claims asserted by the United States as trustee, stating as follows:

> Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] Amendment excluding those rights from its coverage would enervate the Amendment's objective.

424 U.S. at 811 (footnote omitted).

In *California v. United States*, 438 U.S. 645 (1978), the Court reiterated its recognition of the importance of being able to join all parties, including the United States, in general adjudications. The Court, referring to the McCarran Amendment, 43 U.S.C. § 666, quoted with approval the following statement made at congressional hearings:

> "Since it is clear that the States have control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years."

438 U.S. at 678-79.

The Ninth Circuit's decision that Arizona state courts may not adjudicate Indian water rights, jeopardizes not only Arizona's but all the western states' ability to adjudicate and administer their water laws in a manner recognized as essential by this Court, as well as by the Congress. One critical reason is that the *amici*, Utah, Idaho,

North Dakota, Alaska and New Mexico, all have Enabling Acts or constitutional disclaimers essentially identical to Arizona's.[2]

Moreover, general adjudications are ongoing not only in Arizona but throughout the west. For example, New Mexico has ten separate pending stream adjudications; Nevada has approximately fifty pending adjudications; Idaho has nine and Utah has thirteen encompassing nearly 85% of the State's land area.

The New Mexico adjudications encompass a land area in excess of 28,077 square miles. The number of defendants in these actions exceeds 15,970. The rivers involved include the Taos, Rio Pojoaque, Santa Cruz and Truchas, Chama, Red, San Cristobal, Santa Fe, San Juan, Pecos and Mimbres Rivers. These adjudications affect water rights claimed on behalf of twelve separate Indian tribes.[3]

Idaho's nine pending stream adjudications include the Payette River, Lemhi River, Basin Creek, Cow Creek, Reynolds Creek, Hurd Gulch, Bancroft-Lund River, Shoofly

---

[2] *See* New Mexico and Arizona Enabling Act of June 20, 1910, 36 Stat. 557; Idaho Const., Art. 21, Sec. 19, ratified by Congress, 26 Stat. 215 (1890); Utah Enabling Act, 28 Stat. 267 (1906); Enabling Act of North Dakota, 25 Stat. 676 (1889); Alaska Con., Art. XII, Sec. 12 (1958).

[3] Taos Adjudication, *State of New Mexico, ex rel. S. E. Reynolds v. Abeyta, et al.*, U.S.D.C. Nos. 7896 and 7939 Consolidated; Rio Pojoaque, *State of New Mexico, ex rel. S. E. Reynolds v. Aamodt*, U.S.D.C. No. 6639; Santa Cruz and Truchas, *State of New Mexico, ex rel. S. E. Reynolds v. Abbott, et al.*, U.S.D.C. Nos. 7488 and 8650 Consolidated; Chama, *State of New Mexico, ex rel. S. E. Reynolds v. Aragon, et al.*, U.S.D.C. No. 7941; Red River, *State of New Mexico, ex rel. S. E. Reynolds v. Molybdenum Corp. of America, et al.*, U.S.D.C. No. 9780; San Cristobal, *State of New Mexico, ex rel. S. E. Reynolds v. Arellano*, U.S.D.C. No. 76-036P; Santa Fe River, *Anaya, et al. v. Public Service Co., et al.*, No. 43,347, Dist. Ct. of Santa Fe County; San Juan River, *State of New Mexico, ex rel. S. E. Reynolds v. United States of America*, No. 75-184, Dist. Ct. of San Juan County; Pecos River, *State of New Mexico, ex rel. S. E. Reynolds v. Lewis, et al.*, Nos. 29294 and 22600 Consolidated, Dist. of Chaves County; Mimbres River, *Mimbres Valley Irrigation Co. v. Salopek, et al.*, No. 6236, Dist. Ct. of Luna County.

Creek and Snake River adjudications.[4] These adjudications affect approximately 6,886 square miles of land within the State of Idaho. Some of these adjudications have been ongoing since November 12, 1969 when the general determination for conflicting rights to the waters of the Payette River Drainage Basin was filed.

The decisions of the Ninth Circuit are not only contrary to the decisions of this Court interpreting the McCarran Amendment, but also create a clear conflict with the decision of the Tenth Circuit Court in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979). The impact of this conflict has clouded and chilled the effectiveness and meaning of the water rights

---

[4] *In the Matter of the General Determination of the Right to the Use of Surface and Groundwaters of the Payette River Drainage Basin*, Civil No. 3667 (commenced November 12, 1969, 3rd Jud. Dist., Gem Co., Idaho); *In the Matter of the General Determination of the Rights to the Use of Surface and Groundwaters of the Reynolds Creek Drainage Basin*, Civil No. 3456 (commenced April 14, 1978, 3rd Jud. Dist., Owyhee Co., Idaho); *In the Matter of the General Determination of the Right to the Use of Surface Waters and Tributaries From Whatever Source of the Lemhi River Drainage Basin*, Civil No. 4948 (commenced August 13, 1970, 7th Jud. Dist., Lemhi Co., Idaho); *In the Matter of the General Determination of the Right to the Use of Surface and Groundwaters of Mill Creek, Warm Springs, Spring Creek and Their Tributaries, All Commonly Called Basin Creek Drainage Basin*, Civil No. 7354 (commenced October 12, 1979, 3rd Jud. Dist., Payette Co., Idaho); *In the Matter of the General Determination of the Rights to the Use of Surface and Groundwaters in the Area Commonly Known as the Bancroft-Lund Area*, Civil No. 2919 (commenced March 28, 1980, 6th Jud. Dist., Caribou Co., Idaho); *In the Matter of the General Determination of the Rights to the Use of Surface Waters of the Cow Creek Drainage Basin*, Civil No. 5745 (commenced June 13, 1977, 1st Jud. Dist., Boundary Co., Idaho); *In the Matter of the General Determination of the Rights to the Use of Surface Waters of the Snake River From the Base of Milner Dam to the Idaho-Oregon Border*, Civil No. 73804 (commenced January 28, 1981, 4th Jud. Dist., Ada Co., Idaho); *In the Matter of the General Determination of the Rights to the Use of Surface and Groundwaters of the Upper Shoofly Creek Drainage Basin*, Civil No. 4310 (commenced April 28, 1982, 3rd Jud. Dist., Owyhee Co., Idaho).

adjudication process in the western states. The *amici* therefore respectfully urge this Court to grant Arizona's petition for *certiorari* in this case.

## REASON FOR GRANTING THE WRIT: THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT INTERPRETING THE McCARRAN AMENDMENT AND IS EXPRESSLY CONTRARY TO A DECISION OF THE TENTH CIRCUIT COURT OF APPEALS

### I. Colorado River Water Conservation District v. United States

This Court held unequivocally in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), that the McCarran Amendment evinced a policy of avoiding piecemeal adjudications and that to effectuate that policy, all federal water rights, including those held by the United States on behalf of Indians, must be subject to state jurisdiction in proceedings in conformance with the terms of the McCarran Amendment. After analyzing the language of the Amendment itself, as well as its underlying policy, the Court found that excluding Indian water rights from its coverage "would enervate the Amendment's objective." 424 U.S. at 811.

The Ninth Circuit in this case distinguished Arizona state courts from those of Colorado on the basis that the Arizona Constitution and Enabling Act contain language disclaiming "all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes" and providing that such lands shall "remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . ." According to the court, this language deprived Arizona state courts of subject matter jurisdiction, a defect not addressed by the McCarran Amendment's waiver of sovereign immunity.

This interpretation of the disclaimer language not only "enervates the Amendment's objective" but also disregards this Court's holding in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

This Court recognized in *Kake* that the Western States' disclaimer provisions were disclaimers of proprietary interest, not governmental interests. 369 U.S. at 69. Interestingly, the Ninth Circuit has held to the same effect in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981). The Court cited the *Kake* and *Jicarilla* decisions for the proposition that the "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." 649 F.2d at 1280.

It is clear that Congress has jurisdiction and control over land owned by the United States and held by it in trust for Indians, so that such lands always remain subject to disposition by Congress. State disclaimers are simply an acknowledgement that Congress has such plenary power over Indian tribes and property. Moreover, this principle applies in all fifty states, not just those with express constitutional disclaimers to that effect. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832). It is precisely this plenary control which Congress exercised by enacting the McCarran Amendment to authorize the states to adjudicate reserved water rights held in trust by the United States on behalf of Indians. Nothing in the disclaimer language prevents the states from accepting and implementing this congressional grant of regulatory jurisdiction relating to a vital area of state governmental interest.

Nevertheless, the Ninth Circuit chose in this case to create a substantial exception to the Congressional grant of jurisdiction provided by the McCarran Amendment, an exception which would indeed, in the words of this Court, "enervate the Amendment's objective." That objective is to provide unified proceedings under which federally created rights will be determined in accordance with federal law

and state created rights will be determined in accordance with state law. As this Court found in *Colorado River*, "Indian interests may be satisfactorily protected under regimes of state law. The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." 424 U.S. at 812-13 (citations omitted). The Ninth Circuit decision undermining this objective is in error.

## II. Jicarilla Apache Tribe v. United States

The Ninth Circuit admitted that its decision in this case is expressly contrary to that of the Tenth Circuit in the case of *Jicarilla Apache Tribe v. United States, supra.*

The Tenth Circuit in the *Jicarilla* case confronted the same challenge to state jurisdiction based on identical constitutional disclaimer provisions. Relying in part on this Court's decision in *Colorado River*, the *Jicarilla* court rejected the contention that the disclaimer provisions deprived New Mexico state courts of the power to adjudicate Indian claims pursuant to the McCarran Amendment. 601 F.2d at 1131-1135. The Tenth Circuit determined that the McCarran Amendment granted to all states, including the nine western disclaimer states, subject matter jurisdiction in comprehensive proceedings to adjudicate federal claims to water rights, including those held on behalf of Indian tribes. The court stated that "there exists no conflict between state court assumption of jurisdiction governing general water rights adjudication ... and the Disclaimer provisions [since] the United States is the proper party to protect *all* federally reserved water rights, including those set aside for use by the Indian tribes." 601 F.2d at 1131 (emphasis by the court). The court then found the proposition that disclaimers apply only to proprietary interests "particularly persuasive in light of the non-proprietary intent in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F.2d at 1133.

With respect to the application of Public Law 83-280, the Tenth Circuit relied on the express language of the law itself, as well as this Court's interpretation in *Colorado River*. P.L. 83-280, according to this Court, "does not purport to limit the special consent to jurisdiction given by the McCarran Amendment." 424 U.S. at 812-13 n.20, *quoted in Jicarilla Apache Tribe v. United States*, 601 F.2d at 1132. Indeed, it is clear from the language of the Act (P.L. 83-280) itself that it is inapplicable to water right adjudications. Nevertheless, the Ninth Circuit criticized the *Jicarilla* decision for failing to recognize the distinction between disclaimer and non-disclaimer states which it claimed Congress had drawn in P.L. 83-280. Ironically, it is the Ninth Circuit decision which purports to create a disclaimer/non-disclaimer distinction in the McCarran Amendment, a distinction Congress did not see fit to make.

The result is a clear conflict between federal courts of appeals on this critical issue of state court jurisdiction over Indian water rights. This conflict creates an untenable situation in the Western States which will effectively frustrate the efforts of many of these states to adjudicate all conflicting water rights. This is precisely the situation which Congress sought to correct in enacting the McCarran Amendment.

## CONCLUSION

The Western States joined herein as *amici* are deeply concerned about the debilitating effect of the Ninth Circuit's ruling in this case. It severely hampers the western disclaimer states in an area critical to effective management of their most important natural resource. In addition, the Ninth Circuit's decision is in conflict with the decisions of this Court and with that of the Tenth Circuit in *Jicarilla*. The *amici* respectfully urge this Court to grant Arizona's petition for writ of *certiorari*.

Respectfully submitted,

DAVID H. LEROY
Attorney General of Idaho
Room 210, Statehouse
Boise, Idaho 83720
Telephone: (208) 334-4448
*Attorney for the State of Idaho*

ROBERT O. WEFALD
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
Telephone: (701) 224-2210
*Attorney for the State of North Dakota*

RICHARD H. BRYAN
Attorney General of Nevada
Herold Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170
*Attorney for the State of Nevada*

JEFF BINGAMAN
Attorney General of New Mexico
RICHARD A. SIMMS
Special Assistant Attorney General
(Counsel of Record)
Bataan Memorial Building
Santa Fe, New Mexico 87503
Telephone: (505) 827-2325
*Attorney for the State of New Mexico*

DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261
*Attorney for the State of Utah*

WILSON L. CONDON
Attorney General of Alaska
Pouch K
Juneau, Alaska 99811
Telephone: (907) 465-3600
*Attorney for the State of Alaska*